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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1007

BENJAMIN COHEN,

Petitioner,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner BENJAMIN COHEN respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 12, 1970.

OPINIONS BELOW

On August 29, 1969 the United States District Court for the Middle District of Florida, Jacksonville Division entered its Declaratory Judgment. A copy of the opinion appears in Appendix D. The opinion of the United States Court of Appeals for the Fifth Circuit appears in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 13, 1970. On November 16, 1970 Mr. Justice Black entered an order granting until and including November 25, 1970 for filing petition for a writ of certiorari, without prejudice to the Court's consideration as to whether the application was filed in time. A copy of the order extending time to file petition for writ of certiorari appears in Appendix F. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

WHEN A FLORIDA STATUTE REQUIRES TEN DAYS' NOTICE TO BE GIVEN BEFORE SECURITIES HELD AS COLLATERAL ARE SOLD BY A BANK, DO THE FLORIDA RULES OF CIVIL PROCEDURE APPLY TO REQUIRE AN ADDITIONAL THREE DAYS' NOTICE WHEN NOTICE IS SENT BY REGISTERED MAIL, TO INSURE DUE PROCESS AND EQUAL PROTECTION OF LAW?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

UNITED STATES CODE TITLE 28 SECTION 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

FLORIDA STATUTE 685.02 (repealed effective January 1, 1967)

"SALE OF COLLATERAL SECURITIES. In all cases in which any stock in a corporation, contract, obligations, security or evidence of indebtedness, shall be pledged or deposited as security for the payment of any indebtedness, the person or corporation to whom the same may be pledged, hypothecated or transferred, and their assigns, may sell the same in such manner and on such terms as may be agreed upon in writing by the parties at the time of making the pledge, or thereafter, and such sale shall vest in the purchaser or purchasers the title in and to said pledges, collaterals or securities; provided ten days' notice of said sale be given to the pledgor or his legal representative by personal delivery or by registered mail addressed to the pledgor at the address given by him to the pledgee for that purpose, such period of notice to begin to run from the date of such personal delivery or from the date of posting if such notice is given by registered mail . . ."

RULE A, FLORIDA RULES OF CIVIL PROCEDURE (1954)

"These rules are applicable to all suits of a civil nature and all special statutory proceedings in the Circuit Courts, County Judge's Courts, County Courts, and Civil Courts of Record, whether recognizable as cases at law or in equity, with the exception that the form, content, procedure and time for pleading in all special statutory proceedings shall be as prescribed by the statutes providing for such proceedings, unless these rules shall specifically provide to the contrary. These rules shall be construed to secure the just, speedy and inexpensive determination of every action."

RULE 1.6 (e), FLORIDA RULES OF CIVIL PROCEDURE 1954

"Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

CONSTITUTION OF THE UNITED STATES — AMENDMENT XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF FLORIDA, 1968 REVISION

ARTICLE 1—DECLARATION OF RIGHTS—SECTION 2

BASIC RIGHTS—All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.

ARTICLE 1—DECLARATION OF RIGHTS—SECTION 9

DUE PROCESS—No person shall be deprived of life, liberty, or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

STATEMENT OF THE CASE

Petitioner, Benjamin Cohen, filed Complaint for Declaratory Judgment and Other Relief (App. A), and Amended Complaint for Declaratory Judgment and Other Relief (App. B). In his action filed in the United States District Court for the Middle District of Florida, Jacksonville Division, Petitioner sought a declaration that a notice of sale of collateral in the form of securities sent him by defendant by registered mail was invalid. Petitioner contended that Florida Statute 685.02, 1965, which required ten days' notice of sale, actually required that thirteen days' notice be given prior to the sale of securities held as collateral when notice was served by mail. Jurisdiction was invoked by virtue of diversity of citizenship of the parties and the amount in controversy exceeding ten thousand dollars ($10,000.00). Petitioner is a resident of New York City, New York, and Defendant is a banking institution chartered under the laws of the United States of America with its principal place of business in Jacksonville, Florida. Relief was sought under the provisions of the Federal Declaratory Judgment Act.

The parties entered a pre-trial stipulation stating that the purpose of the action was to determine the validity of the notice of sale given by the Defendant to the Plaintiff regarding the sale of securities held as collateral, under Florida Statute 685.02, 1965, then in existence, Plaintiff had executed and delivered his notes payable to the Defendant Bank in the sum of one hundred thousand dollars on September 3, 1964, Plaintiff had executed a collateral pledge agreement, pledging with the bank as security for repayment of the loan, six thousand two hundred and fifty shares of Bank of Miami Beach stock.

The parties stipulated to facts admitted and requiring no proof at trial, including that ten days' notice of sale by registered mail was given by Defendant to Plaintiff and thirteen days' notice of sale was not given by Defendant to Plaintiff. The notice of sale appears in Appendix A as an exhibit to the Complaint.

The court entered Declaratory Judgment (App. D) denying Petitioner the relief sought on the ground that the Florida Rules of Civil Procedure were intended to apply only to parties to judicial proceedings.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed the decision of the trial court (App. E). The Appellate Court held that the Rules of Civil Procedure could not have any application to the sale of pledged collateral, which it held to be a non-judicial proceeding.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the decision of the United States Court of Appeals for the Fifth Circuit and the decision of the United States District Court for the Middle District of Florida have decided a Federal question in a way in conflict with applicable decisions of this court and constitute a departure from the accepted and usual course of proceedings on an important question of Federal law.

The Appellate Court held that the Florida Rules of Civil Procedure did not apply to sale of pledged collateral, which it found to be a non-judicial proceeding. Petitioner contends that unless the Florida Rules of Civil Procedure

apply, the statute as written constitutes a deprivation of equal protection of law since it treats persons similarly situated differently.

According to Florida Statute 685.02, 1965, a recipient of notice by mail receives less notice than does a recipient of notice by personal delivery.

Florida Statute 685.02, 1965, states in pertinent part:

"685.02 SALE OF COLLATERAL SECURITIES. In all cases in which any stock in a corporation, contract, obligations, security or evidence of indebtedness, shall be pledged or deposited as security for the payment of any indebtedness, the person or corporation to whom the same may be pledged, hypothecated or transferred, and their assigns, may sell the same in such manner and on such terms as may be agreed upon in writing by the parties at the time of making the pledge or thereafter, and such sale shall vest in the purchaser or purchasers the title in and to said pledges, collaterals or securities; provided ten days' notice of said sale be given to the pledgor or his legal representative by personal delivery or by registered mail addressed to the pledgor at the address given by him to the pledgee for that purpose, such period of notice to begin to run from the date of such personal delivery or from the date of posting if such notice is given by registered mail. . . ."

Rule 1.6(e) of the 1954 Florida Rules of Civil Procedure states:

> "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period".

If the foregoing Rule of Civil Procedure applies to Florida Statute 685.02, thirteen days' notice would have been required of defendant instead of ten days' notice.

Rule A of the Florida Rules of Civil Procedure, 1954, announces the scope of the rules. The rules are applicable to special statutory proceedings as well as to law suits in court and the time for pleading in all special statutory proceedings is prescribed by the statute unless the rules specifically provide to the contrary. In the case at bar, the rule enlarges the time required by the Statute.

In addition the Supreme Court of Florida, on June 20th, 1962 filed its Order, as it did on July 28, 1965, providing that all statutes not superseded by the Florida Rules of Civil Procedure remain in effect but those in conflict or inconsistent with the amendments to the rules are repealed.

In its Declaratory Judgment, the trial court stated that the Supreme Court of Florida certainly did not mean to interfere with regulations established by the Florida Legislature for such non-judicial proceedings as the sale of collateral securities. With that position plaintiff cannot agree and contends that the trial court was in error.

The provision for additional time to act in response to a notice received by mail is a matter of essential justice in conformity with due process of law requirements. The same need exists in acting in response to a statutory proceeding as exists in acting in response to a rule-enlarged proceeding. Great injustice would be done if the Court were to hold otherwise, and denial of equal protection of law would result.

Florida Statute 685.02 specifically provides that ten days' notice of sale be given by "personal delivery or by registered mail . . . such period of notice to *begin to run* from the date of such personal delivery or from the date of posting if such notice is given by registered mail . . ." (Emphasis supplied).

Thus it is clear that a person receiving a notice personally delivered in accordance with the statute is being given a greater period of notice and time to act in response. Because the period of notice begins to run from the date of personal delivery, a person to whom the notice is *delivered* has ten days *subsequent to the delivery* within which to take action prior to the sale of securities.

The person to whom registered mail delivered the notice, may possibly not receive that notice for several days; nevertheless the time starts running on the day of the posting. Thus, the person receiving the notice by mail is being deprived of equal protection of law if the statute is construed according to the decision of the trial court as affirmed.

To state the matter another way, when notice is delivered rather than mailed, the time commences to run

upon receipt of the notice; whereas if the notice is mailed, the time runs from the mailing. Thus, a person to whom the notice has been mailed cannot possibly have ten days' actual notice as is afforded a person to whom the notice is delivered. It is improper to hold that the Legislature intended to deprive persons in non-judicial proceedings of equal protection of law or of due process of law. Therefore, the alternative is to hold that the Legislature intended the time to respond to a notice of sale to be available equally for both types of notice recipients, and that the three day extension applicable under the Rules of Civil Procedure, is applicable to statutory proceedings, and to Florida Statute 685.02. The recipient should have ten days within which to take action, no matter what method is used to convey notice, if the Legislature intended to provide for ten days' notice.

In *United States to the Use of Engineering and Equipment Company v. W. B. Wyatt*, 174 F. Supp. 260 (U.S. Dist. Ct. N.D. Fla., 1959), the Court held that the Federal Rules of Civil Procedure were applicable to the Miller Act relating to the computation of period of time for filing notice pursuant to the statute. That case indicates that at least in certain Federal statutory proceedings, the Federal Rules of Civil Procedure do apply. Petitioner contends that under diversity jurisdiction the Federal Court has the power to interpret the state statute under the same rules it would use to interpret the Federal Statute, and thus the procedure established in the case under the Miller Act would apply in the case before this Court. Under that theory the Florida Rules of Civil Procedure would be used to apply to the statute under consideration here, namely the statute giving notice prior to the sale of collateral securities.

In *Tibbetts v. Olson* 108 So. 679 (Fla. 1926), Justice Whitfield, in his concurring opinion, stated "The Constitution is designed to prescribe and limit governmental powers and to secure individual rights against unlawful invasion by public officers or by private parties. . . . The state has power to determine by what process and procedure legal rights may be asserted and determined, provided the procedure adopted as applicable to the particular case does not arbitrarily and unjustly discriminate so as to deny to a party the equal protection of the laws, and does afford reasonable notice and a fair opportunity to be heard before rights are decided, so as not to deprive any person of life, liberty, or property without due process, in violation of organic law." . . .

If the Florida statute regarding notice of sale required in cases in which collateral securities are sold is interpreted in the manner upheld by the decision of the United States Court of Appeals for the Fifth Circuit, Petitioner will be permanently deprived of his rights to equal protection of law and to due process of law. It is respectfully submitted that the Fifth Circuit opinion in this case, based upon diversity of citizenship, should afford Petitioner the same rights as would be afforded a Petitioner under the Miller Act or any other case where the Rules of Civil Procedure are used to retain Constitutionality of a Statute whose language appears to destroy that right.

The Florida Rules of Civil Procedure 1954 are applicable to statutory proceedings as well as to law suits in court, it is submitted.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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NATALIE BASKIN
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Miami Beach, Florida

By _____
Natalie Baskin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 3 true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to Rogers, Towers, Bailey, Jones and Gay, 1300 Florida Title Building, Jacksonville, Florida 32202, Attention: James M. McLean, Esq., this 24th day of November, 1970.

Natalie Baskin